

Food is defined as any solid, liquid, powder or item intended by the seller primarily for human internal consumption, whether simple, compound or mixed, including foods such as condiments, spices, seasonings, vitamins, bottled water and ice. See 86 Ill. Adm. Code 130.310. (This is a GIL).

August 30, 2002

Dear Xxxxx:

This letter is in response to your letter dated August 7, 2002. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), which can be found on the Department's website at www.revenue.state.il.us/Laws/regs/part1200/.

In your letter, you have stated and made inquiry as follows:

I am writing on behalf of the above referenced entity to request a taxability ruling pertaining to the appropriate use of the high rate of tax versus the low rate of tax for prepared food items.

Facts:

AAA is a grocer with multiple locations in Illinois. AAA sells grocery items for off premise consumption as well as prepared foods that are ready for immediate consumption. All food sold in the grocery stores is paid for at the regular grocery store check out counters.

Each store has several different sections which can include a bakery section, a juice bar, a pizza bar, a sandwich bar, a stir fry bar, a self serve salad bar, a self serve hot soup bar and an area where hot food such as baked chicken can be purchased. The juice bar, pizza bar, sandwich bar, stir fry bar and hot food section usually have store personnel available who assist customers with their purchases. There are no separate cash registers in these sections.

Baked goods are primarily prepared off site and are stored in a refrigerated glass cake case. Although the bakery products are ready for immediate consumption, most of the bakery products are not typically eaten on the premises of the retailer. Employees who work behind the glass cake case usually dispense baked goods.

Prepared salads (i.e. potato salad, tuna salad, bean salad, etc) are prepared either at the store or off site. The prepared salads are kept in large containers in a refrigerated

glass case in the store, sold by weight and dispensed by store personnel stationed behind the glass case.

AAA also sells prepared foods which are packaged in individual serving size containers and stored on refrigerated shelves where customers can make their own selections. Some of the prepared foods are ready for immediate consumption and others may require heating before consumption.

Seating is available in all stores in Illinois. Some of the stores have minimal seating (i.e. a bench in front of the store) and other stores have an entire seating area inside the store that can seat up to 100 people. If the store has minimal seating, there are few amenities provided for customer use except for a few plastic utensils, condiments and napkins. Stores with designated interior seating areas provide microwaves for customer use as well as a full supply of utensils and condiments. Neither store layout has any staff to 'service' the seating area.

Current Treatment:

AAA currently charges the high rate of tax on all prepared foods sold in their grocery stores in Illinois. AAA is currently being audited by the Illinois Department of Revenue and the auditor agrees that the high rate of tax should be charged on all prepared foods sold by the store. However, AAA has recently received complaints from a customer because the customer disagrees with being charged the high rate of tax on prepared potato salad sold by weight. This customer has also contacted the Problems Resolution Section of the Illinois Department of Revenue to discuss this issue. The auditor has indicated that he will be requesting a ruling on this issue and recommended AAA also request a ruling.

Applicable Regulations and Letter Rulings:

AAA charges the high rate of tax on all prepared foods they sell because of guidance contained in 86 Ill. Adm. Code 130.310 and Private Letter Ruling ST 91-0134-PLR.

86 Ill. Adm. Code 130.310(b)(2) states 'Gross receipts from sales of food for which facilities are provided so that it can be consumed on the premises where it is sold and gross receipts from sales of food which has been prepared for immediate consumption **do not** qualify for the reduced rate.'

86 Ill. Adm. Code 130.310(b)(3) states '... establishments which sell food items primarily (more than 50%) in quantities greater than individual sized servings incur the reduced rate on gross receipts from retail sales of food items. However, the full rate will apply to all sales made by such establishments which provide facilities for the consumption of food on premises unless those facilities utilize a separate means of recording and accounting for collection of receipts from such sales for consumption on the premises and are physically partitioned from areas in which food not for immediate consumption is sold.'

Private Letter Ruling ST 91-0134-PLR states '...if you provide an eating area in your establishment, even the food which you sell in bulk is taxable at the high rate. The exception to this rule occurs when you utilize a separate means of collecting receipts on

food for immediate consumption (i.e. separate register) and you physically partition the eating area from the area in which food not for immediate consumption is sold.'

Since AAA does not utilize separate cash registers for the sale of prepared foods nor do they physically partition their seating areas from their general grocery areas, they do not meet the exception outlined in 86 Ill. Adm. Code 130.310(b)(3) and Private Letter Ruling ST 91-0134-PLR

Ruling Request:

Please confirm that the high rate of tax should be charged on all prepared foods sold by AAA in its grocery store regardless of whether the store provides 'minimal' seating (either inside or outside of the store) or has a designated seating area inside the store. Additionally, we request guidance as to whether the taxability should be dependent on the size of the purchase (i.e. should the lower rate be charged if less than 8 oz of prepared food is purchased but the higher rate charged if the purchase is for more than 8 oz)?

Thank you for your assistance in this matter. If you need additional information, please feel free to contact me at the STATE address listed above or call me.

The Retailers' Occupation Tax Act imposes a tax upon "persons engaged in the business of selling at retail tangible personal property, including computer software, and including photographs, negatives, and positives that are the product of photoprocessing, but not including products of photoprocessing produced for use in motion pictures for public commercial exhibition." 35 ILCS 120/2. The state rate is 6.25% plus applicable local taxes for general merchandise and 1% plus applicable local taxes for items that qualify as food, drugs or medical appliances.

Please find enclosed a copy of 86 Ill. Adm. Code 130.310 regarding tax on food, medicine and medical appliances under the Retailers' Occupation Tax Act. As you can see, the regulation provides that food which is to be consumed off the premises where it is sold (other than alcoholic beverages, soft drinks, and food which has been prepared for immediate consumption), and prescription and non-prescription medicines, drugs, and various medical appliances are taxed at the State rate of 1% plus applicable local taxes. Food is defined as any solid, liquid, powder or item intended by the seller primarily for human internal consumption, whether simple, compound or mixed, including foods such as condiments, spices, seasonings, vitamins, bottled water and ice. See Section 130.310(b)(1).

Products that do not meet the appropriate definitions of food, drugs, medicines or medical appliances, or are food prepared by the vendor for immediate consumption, are taxable at the higher State sales tax rate of 6.25% plus applicable local taxes.

Food for immediate consumption is defined in the regulation as hot food and food made ready by the retailer to be eaten without substantial delay after the final stage of preparation by the retailer. Retailers who sell food which they do not prepare in any way, are not selling food for immediate consumption, i.e., pre-packaged candy bars, snacks, chips, ice cream, unless that food is to be consumed on the retailer's premises. It is presumed that retailers who sell food prepared for immediate consumption in individual single-sized servings will sell all such items for consumption without substantive delay. Thus, for example, a retailer of individual sandwiches, doughnuts or cookies prepared in the morning will be subject to the high rate of tax regardless of when during a business day such items are sold and actually consumed.

The manner in which food is taxed depends upon the nature of the establishment that is selling the food. Retailers who provide seating or facilities for on-premises consumption of food generally incur tax at the high rate on all food sales (including bulk or grocery type items). However, if establishments sell both food that has been prepared for immediate consumption and bulk or grocery type items and also provide facilities for on-premises consumption, the lower rate of tax may be charged on the bulk or grocery type items only if the dining facilities are physically partitioned from the area where food not for immediate consumption is sold and these facilities utilize a separate means of collection of receipts. See 86 Ill. Adm. Code 130.310(b)(3).

If establishments have no seating or facilities for on-premises consumption of food, the tax rate incurred on food sales is determined by whether the majority (over 50%) are bulk or grocery type sales or are sales for immediate consumption. If more than 50% of all food sales are for immediate consumption, the retailer must charge the high rate on all food sales. If more than 50% of all food sales are bulk or grocery type items, all food sales are taxed at the low rate with the exception of hot foods, food that has been prepared for immediate consumption, alcoholic beverages, and soft drinks. See Section 130.310(a).

As a grocery store, any items sold for immediate consumption (e.g. sandwiches prepared at a deli in the store) and any hot foods that are sold are taxable at the high rate of tax. Bulk prepared salads, however, should be taxed at the low rate. As long as the store's cash registers can tax items at the different rates, a separate means of collection is being used. Further, if the areas of the store that are intended for grocery sales and those intended for sales for immediate consumption are distinguishable, the area is considered to be partitioned for purposes of Section 130.310.

I hope this information is helpful. The Department of Revenue maintains a website, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b).

Very truly yours,

Melanie A. Jarvis
Associate Counsel

MAJ:msk
Enc.